89-509 (1)

No. 88-1507

In the Supreme Court of the United States

OCTOBER TERM, 1989

Supreme Court, U.S.
FILED
AUG 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

GERALDINE WALMSLEY, Administratrix of the Estate of THOMAS D. WALMSLEY, DECEASED, and on her own behalf,

Respondent

v.

THE CITY OF PHILADELPHIA and GREGOR SAMBOR and KEVIN TUCKER, Police Commissioners of the City of Philadelphia, and Police Officer John Doe and other unknown and unnamed officers and agents of the City of Philadelphia Police Department, individually and in their capacity as officers of the City of Philadelphia, Police Officer David Grove, Badge #3407, Police Officer Ernest Colwell, Badge #7202, Police Officer Michael Valenti, Badge #2268, Police Officer Mark Goldberg, Badge #1967, Police Lt. Augustine Carre, Badge #98,

Petitioners

v.

ROBERT WALMSLEY,

Respondent

Third-Party Defendant

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit, Civil Action No. 88-1507 reversing the order of the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 87-5182, granting petitioners' motion for a directed verdict

Petition for Writ of Certiorari of Police Officer Ernest Colwell, Badge #7202 and Police Officer Michael Valenti, Badge #2268

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Third Circuit Court of Appeals err as a matter of law in reversing the District Court's grant of a motion for directed verdict by finding that respondent Geraldine Walmsley's evidence, which only established the bare *possibility* of police misconduct, provided a sufficient basis upon which a jury could conclude that police officers Ernest Colwell and Michael Valenti actually beat the decedent Thomas Walmsley with their nightsticks and were deliberately indifferent to his serious medical needs?

2. Did the Third Circuit Court of Appeals err as a matter of law in holding that a credibility dispute involving the testimony of Officers Colwell and Valenti in respondent Walmsley's case in chief, concerning one of the underlying facts (the location at which the officers arrested the decedent and first placed him in their custody) is sufficient to sustain Walmsley's burden of proving that the officers had struck the decedent?

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LIST OF PARTIES

Before trial, all of the defendants were dismissed as parties, by agreement, with the following exceptions:

1. Police Officer Ernest Colwell, Badge #7202
2. Police Officer Michael Valenti, Base 2268
3. Police Lt. Augustine Carre, Badge #98

The Third Circuit affirmed the dismissal of all counts against Police Lt. Augustine Carre. Therefore Lt. Carre is not a party to this petition. Both Geraldine Walmsley and Robert Walmsley remain parties to this petition.

TABLE OF AUTHORITIES

Cases Page

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) .. 4, 7, 8

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Walmsley v. City of Philadelphia, 872 F.2d 546 (3d Cir. 1989) (*reh'g denied*) ..... v, 7

REPORT OF OPINION

Walmsley v. The City of Philadelphia, 872 F.2d 546 (3d Cir. 1989) *(reh'g denied)*.

STATEMENT OF SUPREME COURT JURISDICTION

The Third Circuit's order reversing the District Court's grant of defendant's motion for directed verdict was handed down on April 12, 1989. The Third Circuit's order denying appellees' application for rehearing and rehearing in banc was handed down on May 12, 1989.

The Supreme Court has jurisdiction to review the judgment of the Third Circuit by writ of certiorari based upon 28 U.S.C. 2101(c) and Supreme Court Rules 17.1(c), 20.2 and 20.4.

RULE INVOLVED

F.R. Civ. P. 50

(a) Motion For Directed Verdict: When Made; Effect. A party who moves for a direct verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

No. 88-1507

In the Supreme Court of the United States

OCTOBER TERM, 1989

GERALDINE WALMSLEY, Administratrix of the Estate of THOMAS D. WALMSLEY, DECEASED, and on her own behalf,

Respondent

v.

THE CITY OF PHILADELPHIA and GREGOR SAMBOR and KEVIN TUCKER, Police Commissioners of the City of Philadelphia, and Police Officer John Doe and other unknown and unnamed officers and agents of the City of Philadelphia Police Department, individually and in their capacity as officers of the City of Philadelphia, Police Officer David Grove, Badge #3407, Police Officer Ernest Colwell, Badge #7202, Police Officer Michael Valenti, Badge #2268, Police Officer Mark Goldberg, Badge #1967, Police Lt. Augustine Carre, Badge #98,

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ROBERT WALMSLEY,

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On Writ of Certiorari to the United States Court of Appeals for the Third Circuit, Civil Action No. 88-1507 reversing the order of the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 87-5182, granting petitioners' motion for a directed verdict

Petition for Writ of Certiorari of Police Officer Ernest Colwell, Badge #7202 and Police Officer Michael Valenti, Badge #2268

STATEMENT OF THE CASE

The Third Circuit's opinion details almost all of the facts which respondent Geraldine Walmsley (hereinafter referred to as "Walmsley") presented to the jury in her case in chief in United States District Court for the Eastern District of Pennsylvania, which had jurisdiction pursuant to 28 U.S.C. §1331. With the addition of several other facts not mentioned in the opinion, the following is a summary of the evidence upon which Walmsley wanted a jury to render a verdict in her favor:

1. The decedent Thomas Walmsley (hereinafter referred to as "Tom" or "the decedent") sustained facial injuries during a prolonged, violent fight with his brother Robert and two of their roommates which occurred just after midnight.

2. Despite these injuries, Tom was alive and not in any apparent danger of dying suddenly when he was taken into police custody by Officers Ernest Colwell and Michael Valenti (hereinafter referred to as "Colwell and Valenti").

3. Tom was pronounced dead at a hospital approximately one hour after being taken into police custody.

4. Tom died as a result of swelling to his brain.

5. The swelling also caused several lumps on his scalp which could not be seen from the outside.

6. The swelling was caused by several impacts to his scalp.

7. The impacts occurred anywhere from a few minutes up to 48 hours before his death.

8. The impacts resulted from contact with a blunt instrument which would not cause bleeding or a breakage of the skin on the scalp.

9. A police nightstick is one of several possible blunt instruments which could have caused the injuries.

10. Officers Colwell and Valenti carried police nightsticks with them when they arrested Tom and placed him in their custody.

11. The officers had two opportunities to strike Tom with their nightsticks: when they arrested him and first placed him

in their custody, and when they drove away from the house with Tom in custody in the back of their police van.

12. Officers Colwell and Valenti testified that they arrested Tom and first placed him in their custody in the alleyway behind his house; two witnesses' testimony inferentially places the officers in the house at the time of the arrest.

In addition, Walmsley cited several other facts which she believed supported her case, although the Third Circuit apparently disagreed since the court failed to cite these in their opinion.

1. Neither Walmsley nor Tom's sister saw lumps on Tom's head after the fight but before Tom returned to the house.

Walmsley's own expert testified that the lumps could not be seen from the outside. They could only be seen once Tom's scalp was cut off and flipped over (A.47-48; 49-50). Moreover, the impacts occurred anywhere from a few minutes to 48 hours before swelling would protrude through Tom's skull (A.57, 58).

2. Another police officer testified that as Tom was being led from the alleyway to the police van, he looked "beaten up" and "worse" than he had about one hour earlier when the officer arrived shortly after Tom's fight with his brother.

Tom received a swollen black eye and a swollen and cut lip during the fight with his brother (A.47-48). Also, Walmsley's own experts testified that the facial injuries Tom suffered would not have caused the brain swelling which caused Tom's death (A.51, 52-53, 55).

3. An ammonia capsule placed under Tom's nose by the officers, in an unsuccessful attempt to try to revive him in the police van, may have had blood on it, as may the floor of the van upon which the capsule was left. Additionally, Walmsley said she saw blood on her hands after she had placed them on Tom's head after Tom had died.

Walmsley's own experts testified that a blunt instrument must have caused the injuries because Tom suffered no bleeding or breakage of the scalp, and only a blunt instrument could cause such injuries without bleeding (A.48). Also, the

witness who first thought that the capsule had blood on it testified that the red color may have been iodine (A.38-43).

4. One of five photographs of the inside of the van was missing. The evidence indicated that this was one of two photos of the inside of the van. The next photo which was developed also showed the interior, including the ammonia capsule (A.44-45). The testimony indicated that it is not uncommon for the photograph to have been a duplicate and thus not preserved (A.45-46).

ARGUMENT

The decision of the United States Court of Appeals for the Third Circuit violates this Court's long standing precedent concerning the type of evidence necessary to sustain a jury verdict as determined by the cases of *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984) and *Moore v. Chesapeake & Ohio Ry.Co.*, 340 U.S. 573 (1951). The decisions also violates the standard of review of directed verdicts outlined by this court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

Outside of the testimony of Officers Colwell and Valenti, Walmsley's evidence simply fails to rise to the level necessary for a reasonable jury to logically infer that these officers violated Tom's civil rights by unjustifiably beating him on the head with police nightsticks when he was in their custody. Walmsley only presented a scintilla of evidence indicating that the officers could possibly have beaten Tom, which is insufficient to meet Walmsley's burden of proof. *Anderson*, 477 U.S. at 252. The officers carried their nightsticks with them when they arrested Tom. These nightsticks were one of several possible blunt instruments which could have caused the impacts which led to death by brain swelling. The officers had the opportunity to strike Tom both at the time of Tom's arrest and after they drove him away in the police wagon. However, none of this evidence proves even inferentially that the officers actually struck Tom.

In *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637

F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981). Judge Aldisert, who dissented in the case at bar, explained the directed verdict standard in a case such as the case at bar, where plaintiff's case, and defendant's liability, is based solely on circumstantial evidence:

> The illegal action must be inferred from the facts shown at trial. Inferred factual conclusions based on circumstantial evidence are permitted only when, and to the extent that, human experience indicates a probability that certain consequences can and do follow from the basic circumstantial facts.
>
> * * *
>
> A court permits the jury to draw inferences because of this shared experience in human endeavors.

Id. at 116. Judge Aldisert further explained, in *Tose v. First Pennsylvania Bank, N.A.*, 648 F.2d 879 (3d Cir. 1981), how a reasonable inference may be drawn:

> The line between a reasonable inference that may permissibly be drawn by a jury from basic facts in evidence and an impermissible speculation is not drawn by judicial idiosyncracies. The line is drawn by the laws of logic. If there is an experience of logical probability that an ultimate fact will follow a stated narrative or historical fact, then the jury is given the opportunity to draw a conclusion because there is a reasonable probability that the conclusion flows from the proven facts.

Id. at 895.

In the present matter human experience, based upon shared human endeavors, does *not* indicate a *probability* that the presence of Officers Colwell and Valenti in the house to investigate a reported disturbance and to make a valid arrest would be followed by their brutal beating of the decedent on his scalp with their nightsticks. Nor does human experience indicate a probability that custody of the arrested decedent in the back of the police van driven away from the house would

be followed by the officers beating the decedent with their nightsticks. As Judge Aldisert correctly noted in his dissent:

> There was no proof that headbashing with clubs was a longstanding police practice. You can neither assume nor draw a reasonable inference that such police brutality always takes places or took place here.

Walmsley v. City of Philadelphia, 872 F.2d 546, 553. Walmsley offered no proof that the two officers involved, Colwell and Valenti, routinely beat suspects or arrestees after being alone with them or taking them into custody. The evidence also failed to show that the decedent did anything to resist arrest or provoke the officers to beat him. Upon the facts elicited at trial, no reasonable jury could reasonably infer, without resorting to impermissible guesswork and mere speculation, that one or both officers beat the decedent simply because they were alone with him for a period of time when they arrested him and placed him in custody. The law of logic could not lead to plaintiff's ultimate fact conclusion; only passion and prejudice could do so.

Additionally, a jury could not reach Walmsley's ultimate fact conclusion, that one or both of these police officers deprived the decedent of his civil rights by beating him with their nightsticks, based upon the possibility that their testimony regarding the ultimate fact, denying that they struck the decedent, may be false. Walmsley's insufficient basic facts are not augmented to the level of logical probability based on the addition of *negative* evidence directly concerning the ultimate facts in issue. Moreover, a jury may not reach plaintiff's ultimate fact based upon the dispute over the basic fact of whether the officers entered the house before they arrested the decedent. A jury may, at the most, logically infer that the testimony of the two neighbors places the two police officers in the house. Therefore a jury may disregard the police officer's testimony that they did not enter the house. Mere disbelief in this part of the officers' testimony, however, does not permit a jury to find that the opposite of what the officers testified to regarding the ultimate fact (that they did not strike

the decedent) is true. In *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), this Court stated that:

> When the testimony of a witness is not believed, the trier of fact may simply disregard it. Normally the discredited testimony is not considered a sufficient basis for drawing a contrary conclusion.

Id. at 512 (citation omitted). In the present case, the Third Circuit erred when it held that the trier of fact (the jury) could consider the officers' disputed testimony on one matter as a sufficient basis for drawing a contrary conclusion on a separate matter. The Court further erred in ruling that this contrary conclusion establishes "that the plaintiff presented sufficient circumstantial evidence to permit the jury reasonably to conclude that Tom was involved in a confrontation with Officers Colwell and Valenti in which he received injuries that could have caused his death." *Walmsley*, 872 F.2d at 552.

This Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (which held that the standard of review of a summary judgment motion is identical to that of the standard of review of a directed verdict motion) also addressed the issue of whether discredited testimony by a defendant is capable of defeating a directed verdict motion:

> Respondents argue, however, that whatever may be true of the applicability of the "clear and convincing" standard at the summary judgment or directed verdict stage, the defendant should seldom if ever be granted summary judgment where his state of mind is at issue and the jury might disbelieve him or his witnesses as to this issue. They rely on Poller v. Columbia Broadcasting Co. 368 US 464 (1962), for this proposition. We do not understand Poller, however, to hold that a plaintiff may defeat a defendant's properly supported motion for summary judgment . . . without offering any concrete evidence from which a reasonable juror could return a verdict in his favor and by merely asserting that the jury might, and

> legally could, disbelieve the defendant's denial ... The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict ... As we have recently said, "discredited testimony is not [normally] considered a sufficient basis for drawing a contrary conclusion." Bose Corp. v. Consumers Union of United States, Inc., 466 US 485, 512 (1984). Instead, the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment.

Id., 477 U.S. at 256-57. In the present case Walmsley has no "concrete evidence" or "affirmative evidence" from which a reasonable juror could return a verdict in her favor. She merely asserts that "the jury might, and legally could, disbelieve the" officers' denial that they struck the decedent. *Id.* The Third Circuit erroneously held that this met Walmsley's burden of proof. However, as *Anderson* makes clear, this does not meet a plaintiff's burden of producing evidence that would support a jury verdict.

This Court's decision in *Moore v. Chesapeake & Ohio Ry.Co.*, 340 U.S. 573 (1951), upon which the *Bose* Court relied, best illustrates the level of proof necessary to sustain a jury verdict in a case, such as the one at bar, where plaintiff's case is based largely on credibility. In *Moore*, a widow sued her late husband's employer for the negligence of an employee which allegedly caused her husband's death. The defendant employed the decedent as a brakeman at defendant's railroad switching yard. As part of his job duties, the decedent stood on a footboard at the front of a slowly moving train which was being switched onto another track. He was required to lean forward to signal to the engineer when to begin and when to stop moving the train on to the other track. The widow submitted facts to the jury which showed that the decedent fell from the train on to the track and was killed

before the train could come to a halt. Her theory of negligence was that the engineer brought the moving train to a sudden and unexpected stop, which in turn caused the decedent to fall.

The widow called the engineer to testify in her case in chief. The engineer stated that he did not know at what point the train was supposed to have stopped and thus he would not stop the train until the decedent brakeman would give the signal to stop. The engineer testified that he could see the decedent's hand and arm, which the decedent would use to give the signal to stop, during the entire time that the train was moving. The engineer further testified that he saw the decedent fall from the train and then he made an emergency stop.

This Court stated:

> Petitioner attempts to avoid the effect of this by pointing to statements of the engineer which allegedly contradict his testimony that decedent was continuously in his view. Petitioner relies on testimony and measurement of an expert witness, and upon the fact that the jury was permitted to view the engine and tender, to support the alleged contradiction. As a consequence, it is asserted, the jury was entitled to disbelieve the engineer's version of the accident and to accept petitioner's.
>
> True, it is the jury's function to credit or discredit all or part of the testimony. But disbelief of the engineer's testimony would not supply a want of proof. *Bunt v. Sierra Gold Mng. Co.*, 138 U.S. 483, 485 [1891]. Nor would the possibility alone that the jury might disbelieve the engineer's version make the case submissible to it.

Id., 340 U.S. at 576. The widow presented inconsistencies in the engineer's testimony regarding one of the basic facts—whether the engineer could see the decedent during the entire time that the train was moving. An expert witness also testified to contradict the engineer's version of this basic fact. The jury was even permitted to view the scene to see for

themselves whether the engineer could truly see the decedent all of the time. Despite this, the Court affirmed the trial judge's granting of defendant's motion for judgment not withstanding the verdict after the trial court reserved the decision on the defendant's directed verdict motion.

The case at bar closely parallels the *Moore* case. Walmsley has presented some evidence, outside of the officers' testimony, indicating that the officers could possibly have struck the decedent with their nightsticks. Similarly, the widow in *Moore* presented some evidence, outside of the engineer's testimony, indicating that the engineer could possibly have suddenly stopped the train and that this could have caused the decedent to fall. Walmsley identified certain inconsistencies between each officers' account of the arrest of Tom. Similarly, the widow in *Moore* identified inconsistencies in the engineer's testimony regarding whether he could see the decedent during the entire time that the train was moving. Walmsley brought two witnesses which contradicted the officers' testimony regarding where Tom was arrested. The widow in *Moore* brought an expert witness to contradict the engineer's testimony regarding whether the decedent could be seen all of the time. Walmsley identified a credibility dispute concerning one of the basic underlying facts, and argued that this calls into question the officers' entire testimony, entitling the jury to disbelieve the officers and accept Walmsley's version of the incident. The widow in *Moore* also attacked the credibility of the engineer concerning one of the basic underlying facts and asserted that "the jury was entitled to disbelieve the engineer's version of the accident and to accept petitioner's." *Moore*, 340 U.S. at 576. The *Moore* Court ruled that disbelief of the engineer's testimony does not supply proof that the engineer was negligent or make the case submissible to a jury. Similarly, disbelief of the officers' testimony does not supply proof that the officers beat Tom or make Walmsley's case submissible to a jury. The Third Circuit erred when it ruled that disbelief does supply adequate proof requiring the case to be submitted to a jury.

WHEREFORE, petitioners respectfully request this Honorable Court to grant their petition.

Respectfully submitted,

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City Solicitor
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Chief Deputy in Charge of Claims
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/s/ BARBARA R. AXELROD
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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 88-1507

GERALDINE WALMSLEY, Administratrix of the Estate of THOMAS D. WALMSLEY, Deceased, and on her own behalf,

Appellant,

v.

THE CITY OF PHILADELPHIA and GREGOR SAMBOR and KEVIN TUCKER, Police Commissioners of the City of Philadelphia, and POLICE OFFICER JOHN DOE and other unknown and unnamed officers and agents of the City of Philadelphia Police Department, individually and in their capacity as officers of the City of Philadelphia, POLICE OFFICER DAVID GROVE, Badge #3407, POLICE OFFICER ERNEST COLWELL, Badge #7202, POLICE OFFICER MICHAEL VALENTI, Badge #2268, POLICE OFFICER MARK GOLDBERG, Badge #1967, POLICE LT. AUGUSTINE CARRE, Badge #98,

Appellees,

v.

ROBERT WALMSLEY

Third-Party Defendant

On Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. Civil No. 87-5182)

Present: HIGGINBOTHAM, COWEN and ALDISERT, *Circuit Judges.*

JUDGMENT

This case came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel January 11, 1989.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered May 25, 1988, be, and the same is hereby reversed insofar as a directed verdict was granted on plaintiff's claims that the defendants Colwell and Valenti used excessive force when arresting Thomas Walmsley and were deliberately indifferent to his serious medical condition, in violation of his civil rights, and affirmed in all other respects. Costs taxed against the appellees. All of the above in accordance with the opinion of this Court.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 88-1507

GERALDINE WALMSLEY, Administratrix of the Estate of THOMAS D. WALMSLEY, Deceased, and on her own behalf,

Appellant,

v.

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Appellees,

v.

ROBERT WALMSLEY

Third-Party Defendant

SUR PETITION FOR REHEARING

Before: GIBBONS, *Chief Judge*, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN and NYGAARD, *Circuit Judges*, ALDISERT*, *Senior Circuit Judge*

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*As to panel rehearing.

The petition for rehearing filed by appellees in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ ROBERT E. COWEN
Circuit Judge

Dated: May 12, 1989

Geraldine WALMSLEY, Administratrix of the Estate of Thomas D. Walmsley, Deceased, and on her own behalf, Appellant,

v.

The CITY OF PHILADELPHIA and Gregor Sambor and Kevin Tucker, Police Commissioners of the City of Philadelphia, and Police Officer John Doe and other unknown and unnamed officers and agents of the City of Philadelphia Police Department, individually and in their capacity as officers of the City of Philadelphia, Police Officer David Grove, Badge #3407, Police Officer Ernest Colwell, Badge #7202, Police Officer Michael Valenti, Badge #2268, Police Officer Mark Goldberg, Badge #1967, Police Lt. Augustine Carre, Badge #96, Appellees,

v.

Robert WALMSLEY,
Third-Party Defendant.

No. 88–1507.

United States Court of Appeals,
Third Circuit.

Argued Jan. 11, 1989.

Decided April 12, 1989.

Rehearing and Rehearing In Banc
Denied May 12, 1989.

Civil rights action was brought arising out of death of arrestee and alleging excessive force and deliberate indifference to medical needs. The United States District Court for the Eastern District of Pennsylvania, Louis Charles Bechtle, J., directed verdict in favor of defendants. Appeal was taken. The Court of Appeals, Cowen, Circuit Judge, held that: (1) evidence was sufficient to create jury question as to whether police officers used excessive force in affecting arrest, and (2) evidence was sufficient to create jury question as

to whether arresting officers were deliberately indifferent to arrestee's serious medical needs.

Affirmed in part and reversed in part.

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Aldisert, Circuit Judge, filed a dissenting opinion.

1. Civil Rights—13.4(3)

Police officers had probable cause to arrest individual after being contacted by individual's mother who informed police of individual's threat to "wreck" brother's house and get a gun and shoot anybody coming to house and after being contacted by neighbors in area who complained about noise and disturbance, and thus, officers could not be held liable in civil rights action for false arrest. 42 U.S.C.A. § 1983.

2. Civil Rights—13.4(3)

Given that there was no indication that police lieutenant had any inkling that an arrestee may have suffered serious head injuries or had injuries more severe than might be expected from a fistfight he had earlier that morning with his brother, a reasonable jury could not have concluded that police lieutenant was deliberately indifferent to serious medical need so as to render him liable in a civil rights action. 42 U.S.C.A. § 1983.

3. Civil Rights—13.14

Evidence was sufficient to create jury question in civil rights action as to whether police officers used excessive force in arresting an individual following a disturbance at his home; although it was established that individual had a fistfight with his brother at home before officers arrived, witnesses' description of injuries individual sustained in fight were not consistent with massive head injuries which were determined to have caused his death, and there was contradictory evidence concerning circumstances concerning officers' return to home after fistfight. 42 U.S.C.A. § 1983.

4. Civil Rights—13.14

There was sufficient evidence to warrant giving to jury

question of whether arresting officers were deliberately indifferent to arrestee's serious medical needs so as to render officers liable in civil rights action. 42 U.S.C.A. § 1983.

* * *

Mark B. Frost (argued), Frost, DeMesquita & Rudow, Philadelphia, Pa., for appellant.

Seymour Kurland, City Sol., Norma S. Weaver, Chief Deputy in Charge of Claims, Barbara R. Axelrod, Divisional Deputy in Charge of Appeals, Alan C. Ostrow (argued), Asst. City Solicitor, City of Philadelphia Law Dept., Philadelphia, Pa., for appellees.

Before HIGGINBOTHAM, COWEN and ALDISERT, Circuit Judges.

OPINION OF THE COURT

COWEN, Circuit Judge.

This civil rights action alleges that two Philadelphia police officers so brutally beat the deceased, Thomas Walmsley, that he died from head wounds inflicted by the officers. The district court granted the defendants' motion for a directed verdict at the conclusion of the plaintiff's case. Because we find that the plaintiff's evidence, when examined in a light most favorable to her position, could persuade a reasonable jury to conclude that Thomas Walmsley's civil rights were violated, we will reverse the judgment of the district court.

I.

Since the issue before us is whether the district court properly granted defendants' motion for a directed verdict, we will summarize the evidence presented to the jury which could, if credited, support a verdict in favor of the plaintiff.[1]

1. The district court granted the defendants' motion following the conclusion of the plaintiff's case, and the defendants did not have an opportunity to present evidence which might counter or contradict the evidence presented by the plaintiff. Thus, the following should not be read as a summary of the "facts" of this case, but rather as a summary of the evidence presented, viewed in a light most favorable to the plaintiff. This is, of course, how we must view the evidence when reviewing a district court's grant of a motion for a directed verdict.

A.

Thomas Walmsley died on the morning of September 10, 1985, as the result of swelling of the brain, caused by multiple head injuries. In addition to bruising around his left eye and mouth areas, an autopsy done after his death revealed multiple and extensive contusions of his scalp.[2] According to expert testimony, these injuries were almost certainly caused by multiple blows to the head with a blunt instrument. App. at 315.3. An expert also testified that it was the head/scalp injuries, rather than the facial injuries, which caused the brain swelling resulting in Thomas Walmsley's death. App. at 235. Although a toxicology report produced after the autopsy also disclosed lethal levels of barbiturates and diazepam in Thomas Walmsley's ("Tom") body, an expert testified that in his opinion these drugs were not responsible for the brain swelling that caused Tom's death. App. at 298, 301. That expert also testified that it was unlikely Tom's injuries could have resulted from a fall, resulting in contact with a wall or rock, or from a fistfight, due to their severity, location, and the lack of external abrasions. App. at 293-97. He opined that it was possible the injuries were the result of being clubbed with a nightstick. App. at 293.

At the time of his death, Tom was twenty-six years old, about six feet four inches tall, and weighed approximately 230 pounds. He was employed as an independent contractor who repaired transmissions, and resided at 226 West Fisher Street, in Philadelphia, with his brother, Robert Walmsley ("Robert"), and two of his brother's friends, Billy Ray and Carl Hocher.

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On the evening of September 9, 1985, Robert, Carl Hocher and another friend, James McHale were watching Monday Night Football at 226 West Fisher Street. Robert

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2. An expert pathologist testified that he had noted six impacts to the scalp and at least three impacts to the face. App. at 315. The expert's description of the injuries is at app. at 312-25.

planned to have a meeting of the four persons living in the house following the game to discuss cleaning up the house, and the designation of specific individuals who would be responsible for particular chores. Since Billy Ray was working that evening, and his brother Tom was also out, Robert planned for the meeting to take place at about midnight, after the game.

After Billy Ray returned from work, Robert telephoned his brother, who had since returned and was in his bedroom, to ask him to come to the meeting. When Tom did not answer the phone, Robert went up to his room to get him. After banging on the door, which produced no response, Robert opened the door to find Tom in bed with a woman Robert did not know. Tom became angry over the intrusion, while Robert was upset that Tom had brought a strange woman into the house, and an argument quickly ensued. The argument developed into a physical confrontation, and while accounts of the confrontation vary, several witnesses testified that the brothers were basically wrestling (not exchanging blows), until the last part of the fight, which took place outdoors in front of the house. Witnesses also testified that Tom's head did not bang into any hard object or structure, such as a wall, stair, or rock, throughout the confrontation. *See e.g.*, app. at 68-69.

The parties agreed that during the last part of the fight, several punches were exchanged, and Tom was struck two or three times in the face. Neighbors, meanwhile, had called the police, who arrived shortly thereafter and took Robert and a friend into custody. Witnesses observed Tom, then suffering from a swollen eye and bloody lip, drive away from the scene with his girlfriend. At no time during the confrontation did Tom lose consciousness or appear disoriented.

After leaving 226 West Fisher Street, Tom drove to his parents' house, about a ten minute drive. His mother testified that she applied ice to his eye, and brushed his hair back. His sister also testified that she touched her brother's face and hair. Tom was still angry and agitated. He told his family that he was going back to his brother's house to wreck everything there, and that he would get a gun and shoot anyone who

came back to the house. Then, after sending his girlfriend home in a taxi, Tom left his parents' house and returned to his brother's house.

Upon arriving at his brother's house, Tom apparently carried out his promise, destroying an aquarium, televisions, video and electronic equipment, mirrors, lamps, and other breakable items. At about 1:00 a.m., Tom's sister Angelina Petel called Robert's house and spoke to Tom. Tom told her that he had wrecked everything. Tom, at that point, was the only person in the house.

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Meanwhile, neighbors had again contacted the police. Officers Colwell and Valenti arrived at approximately 1:15 a.m. According to their testimony, they went to the front of the house. Colwell testified that he then went into the alley which led to the back of the house—with Valenti remaining behind—and that he saw Tom come out of the house, and in the area of the porch, landing, or steps behind the house, yell at the house. Valenti also testified that he saw Tom come out of the house, go down into the yard, and enter the alley while hollering in a loud voice. According to Colwell and Valenti, Tom then walked towards the officers and was arrested. He was cooperative, and both Valenti and Colwell testified that they did not engage in a struggle with him or strike him. Thus, according to Valenti and Colwell's testimony, neither officer was in the backyard, or on the porch, landing or steps behind the house, neither officer entered the house, and neither officer ever had occasion to or did strike Tom.

The officers' testimony is contradicted by the testimony of two neighbors who were observing the events that evening. Steven Chalmers testified that he observed two police officers, one in the alley, and one in the backyard, and that the officer in the backyard told him, "It's all over, you can go back in." App. at 152. Chalmers nevertheless continued observing, and saw two other officers bring Tom off the back steps to the back of his house down into the yard. App. at 154. His impression was that these two officers were bringing Tom out of his

house. *Id.* He identified Officers Valenti and Colwell as the two officers. He testified that Tom appeared to be handcuffed at that time, and that he was walking slowly, and with his head down.

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Another neighbor, George Klein, testified as follows regarding what he observed during the second incident:

BY [PLAINTIFF'S ATTORNEY]

Q: And when you heard this glass breaking, what did you do?

A: I went to the front door to see what was going on, and I heard all the glass breaking. It sounded like somebody was demolishing the house. So I yelled in the house to call the police. And then the police came.

Q: Did you see who arrived first or what vehicle arrived first?

A: A car arrived first and then another car. The officers that arrived first went around the back and the one officer went around front, stayed around front knocking on the door.

Q: You say you saw an officer knocking on the door?

A: Yes.

Q: And you say—how many officers went around back?

A: Two that I know of.

. . . .

Q: And you saw the police go down American Street?

A: Yes.

Q: And you lost sight of them?

A: Yes.

Q: And you inferred that they went?

A: Yes, behind the house.

Q: You didn't actually see them go behind the house, did you?

A: No.

Q: What did you see next?

A: I seen a bunch of shadows in the window, and then—

Q: When you say shadows in the window, in whose window did you see shadows?

A: The Walmsley's

Q: Inside 226 West Fisher Street?

A: Yes.

Q: How many shadows did you see?

A: About two people.

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Q: Did you know who they were?

A: No.

Q: Had you seen any of the police officers that were in the front of the house go into the house?

A: No.

Q: Did they?

A: No.

Q: So that the officers in the front never went in?

A: Never went in.

Q: And what room—could you see what room these two shadows were coming from?

A: The living room.

Q: Of 226 West Fisher?

A: Yes.

Q: Did you hear anything going on while you were seeing these two shadows?

A: Just a bunch of glass breaking.

Q: So you still heard glass breaking?

A: Yeah.

Q: What happened after that?

A: And a little while later I seen them come around with Tommy handcuffed.

. . .

BY THE COURT:

Q: And as best you can remember, could you describe [the officers who brought Tom around] for the jury?

A: As best I can remember, the heavyset officer. That's it.

BY [PLAINTIFF'S ATTORNEY]:

Q: Do you recall whether or not this heavyset officer was one of the officers that you saw go behind the house?

A: Yes, he was.

. . .

Q: And do you recall whether the other officer was the same officer that also went behind the house?

A: Yes, as far as I know.

. . .

Q: Do you recall, when you saw those two shadows, how long those officers were in the house?

A: About five minutes.

Q: Were you able to see anything except for those shadows in the living room?

A: No.

Q: Do you know where Tom was when you saw those shadows?

A: He was upstairs, you know, furniture breaking upstairs.

[DEFENDANT'S ATTORNEY]:

Objection, your Honor.

THE COURT:

Well, ask him how he knows that.

BY [PLAINTIFF'S ATTORNEY]:

Q: How do you know where Tom was?

A: You could hear the furniture breaking upstairs.

BY THE COURT:

Q: How do you know he was doing it?

A: I don't.

BY [PLAINTIFF'S ATTORNEY]:

Q: At that time you didn't know who was in the house?

A: Right.

Q: And what you saw come from the house were these two officers and Tom?

A: Right.

App. at 197-203.

Tom was next taken into custody by Officers Valenti and Colwell, and placed in the back of a police van. En route to the van, the officers and Tom encountered Police Lt. Augustine Carre. Lt. Carre observed that Tom appeared to have been beaten up, and asked him if he wanted to go to the hospital. The officers told Carre that they had already asked him whether he wanted to go to the hospital, and he had said he did not. According to Carre, Tom himself also said he did not want to go to the hospital.

Tom was then taken, in the police van, to a police station about five minutes away. When the officers opened the back of the police van, they found that Tom was unconscious. An attempt to revive him with an ammonia capsule was unsuccessful, and the officers took him to the hospital. Tom was declared dead shortly after arriving at the hospital. His mother, when holding her dead son at the hospital, noticed lumps on his scalp that she testified did not exist when she had brushed her son's hair earlier in the evening.

B.

Geraldine Walmsley, Tom's mother, filed this action on August 19, 1987, in her capacity as administratrix of Thomas Walmsley's estate and on her own behalf, against the City of Philadelphia, Gregor Sambor and Kevin Tucker (City Police Commissioners), and Police Officer John Doe and other unknown and unnamed officers. The complaint, which invoked 42 U.S.C. §§ 1983, 1985(3), 1986, and 1988, as well as the first, fourth, fifth, eighth, and fourteenth amendments, alleged essentially three constitutional violations—the excessive use of force, false arrest, and deliberate indifference to medical needs. An amended complaint was filed on September 9, 1987, which added as defendants police officers David Grove, Ernest Colwell, Michael Valenti, and Mark Goldberg, and Police Lt. Augustine Carre. The defendants named, as a third party defendant, the decedent's brother, Robert Walmsley.

The actions against defendants the City of Philadelphia, Gregor Sambor, Kevin Tucker, Mark Goldberg, and David Grove were dismissed by stipulation prior to trial. A trial against defendants Colwell, Valenti, and Carre, and third party defendant Robert Walmsley, commenced on May 16, 1988. On May 24, 1988, after the plaintiff had concluded the presentation of her case, the district court granted the remaining defendants' motion for a directed verdict, dismissing the claims against the defendants and effectively dismissing the third party complaint against Robert Walmsley. The plaintiff filed a notice of appeal on June 20, 1988. We have jurisdiction under 28 U.S.C. § 1291.

II.

The issue before us on appeal is whether the district court erred when it dismissed the plaintiff's claims against Colwell, Valenti, and Carre by way of directed verdict. In reviewing a directed verdict, we are required to utilize the same standard initially applied by the district court. When

deciding a motion for a directed verdict, a court must consider the evidence in the light most favorable to the nonmoving party, and deny a defendant's motion "if there is evidence reasonably tending to support the recovery by plaintiff as to any of its theories of liability." *Flynn v. Bass Bros. Enters. Inc.*, 744 F.2d 978, 983 (3d Cir. 1984) (quoting *Dougherty v. Hooker Chemical Corp.*, 540 F.2d 174, 178 (3d Cir. 1976)). However, a district court's grant of a directed verdict should be upheld if "without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict." *Id.* (quoting *Brady v. Southern Ry.*, 820 U.S. 476, 479, 64 S.Ct. 282, 284, 88 L.Ed. 289 (1948)).

The plaintiff here has made several claims against the defendants. First, she claims that Officers Colwell and Valenti used excessive force when arresting Thomas Walmsley, depriving him of his civil rights. *See Howell v. Cataldi*, 464 F.2d 272, 282 (3d Cir. 1972) (use of force by police which exceeds that which is reasonable and necessary, and violates universal standards of decency gives rise to liability for constitutional deprivation under section 1983). Second, she contends that Thomas Walmsley's arrest by officers Colwell and Valenti without a warrant was without probable cause and was therefore a deprivation of his civil rights. *See Patzig v. O'Neil*, 577 F.2d 841, 848 (3d Cir. 1978) (arrest without probable cause is a constitutional violation actionable under section 1983). Finally, she contends that Colwell, Valenti and Carre were deliberately indifferent to Thomas Walmsley's serious medical needs, and therefore deprived him of his civil rights. *See Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) (deliberate indifference to serious medical needs of person in state custody is a violation of person's eighth amendment right actionable under section 1983).[3]

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[1] We find that the district court properly granted a

3. The plaintiff's complaint did allege additional claims based on violations of both the constitution and Pennsylvania law, but she does not assert an appeal that the district court erroneously dismissed those claims.

directed verdict as to several of these claims. First, the district court properly concluded that the plaintiff did not present sufficient evidence to go forward with her claim that Valenti and Colwell falsely arrested Thomas Walmsley. The police were contacted by Thomas Walmsley's mother, who informed them of his threat to "wreck" his brother's house, and get a gun and shoot anybody coming to the house. Neighbors in the area also called the police to complain about the noise and the disturbance. Given this information, we find that the police clearly had probable cause to arrest Thomas Walmsley.

[2] Second, we find that the district court properly directed a verdict on the plaintiff's claim that Lt. Carre was deliberately indifferent to Thomas Walmsley's serious medical need. The only evidence to support this claim was Lt. Carre's testimony that he observed Thomas Walmsley before he was placed in the police van and that he looked as if he had been beaten. There is no indication, however, that Carre had any inkling that Thomas Walmsley may have suffered serious head injuries, or had injuries more severe than might be expected from the fistfight earlier that morning. Given these facts, we do not think a reasonable jury could conclude that Carre was deliberately indifferent to a serious medical need.[4]

We find that the district court erred, however, in directing a verdict on the plaintiff's claims that Officers Colwell and Valenti used excessive force when arresting Thomas Walmsley, and were deliberately indifferent to Thomas Walmsley's serious medical needs.

[3] The plaintiff presented sufficient evidence from which a reasonable jury could infer that Colwell and Valenti inflicted the injuries which caused Thomas Walmsley's death. Although Thomas Walmsley did have a fistfight with his brother early that morning, several witnesses testified that his head did not bang into a blunt object during the fight, and that Robert's punches struck Tom's face, not his head. These descriptions, when combined with the expert testimony de-

4. We have, of course, discounted Carre's testimony that he asked Thomas Walmsley whether he wanted to be taken to the hospital.

scribing Tom's injuries and the events which would likely cause such injuries, could lead a jury reasonably to conclude that the injuries causing Tom's death were not inflicted during the fight with his brother.

We also conclude that the plaintiff presented sufficient circumstantial evidence to permit the jury reasonably to conclude that Tom was involved in a confrontation with Officers Colwell and Valenti in which he received injuries that could have caused his death. Most significantly on that point, we note that Colwell's and Valenti's accounts of the incidents that preceded Tom's arrest are contradicted by the testimony of two of the plaintiff's witnesses. Officers Colwell and Valenti testified that they never entered the house. One of the plaintiff's witnesses, a neighbor, testified that he observed the silhouettes of two persons in the house through the shade in the house's window at a time when, according to the officers' testimony, only Tom was in the house. Another neighbor testified that he observed two police officers on the back porch of the house, apparently bringing Tom out of the house. Viewed in the light most favorably to the plaintiff, this testimony is sufficient to allow a jury to discredit the testimony of the officers regarding the incidents immediately prior to Tom's arrest including their testimony that they never struck the decedent.

If the officers did strike Thomas Walmsley, the plaintiff must still prove that the force they used was excessive. Given the nature of the injuries and the fact that if force was used, the officers lied and covered up to conceal the use of force, we find that a jury could also reasonably infer that the officers' use of force was excessive, and violated Thomas Walmsley's civil rights.

[4] We also find that the district court erred when it directed a verdict on the plaintiff's claim that Valenti and Colwell were deliberately indifferent to Thomas Walmsley's serious medical needs. If a jury concludes that Colwell and Valenti struck Thomas Walmsley several times about the head with a blunt instrument, it also could reasonably infer that the officers should have known he would require immediate med-

ical attention. Colwell and Valenti's failure to act to provide such attention would amount to a civil rights violation.

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III.

For the reasons expressed in this opinion, we will reverse the district court's grant of a directed verdict on the plaintiff's claims that defendants Colwell and Valenti used excessive force when arresting Thomas Walmsley and were deliberately indifferent to his serious medical condition, in violation of his civil rights. We affirm the remainder of the district court's order.

Costs taxed against the appellees.

ALDISERT, Circuit Judge, dissenting.

I would affirm the judgment for the reasons stated by the district court. Accordingly, I dissent.

The trial judge was convinced that before Thomas Walmsley came under police custody he had been in a knock-down, drag-out brawl that started on the second floor, bounced down to the first floor, and ended outside the house; that the "brawl in the bedroom ended up on the floor, with the decedent lying on his back on the floor," app. at 576; that "it took three of the persons present to try to restrain and hold the decedent to the floor," *id;* that "all three of those men, apparently, were necessary to push the decedent out of the front door violently," *id.* at 577; that "Thomas came out and either slid or fell down one of those railways and landed on his backside as he came out the door," *id.* at 578; that "they were trading punches," *id.* at 578; and "there is testimony that Thomas and Robert both hit the wall twice," *id.* at 579. The trial judge noted that there was testimony that the multiple blunt injuries to the head could have been caused by a fall, "that a wall or stairs could cause these types of injuries." *id.* at 584.

There was no direct evidence that Walmsley had hit his head in the fray, but there was sufficient circumstantial evi-

dence for the trial judge to draw the permissible inference that Walmsley had done so.

Although the burden of proof in this case always rested with the appellant, by brief and oral argument appellant seemed to proceed as if the defendants had the burden. The City did not have to prove that the officers did not assault Walmsley. Rather, the burden was on the plaintiff to show that they did.

The City needed only to show that it was possible that Walmsley was injured in the fight. This showing was made. It was sufficient to rebut plaintiff's claim that the injuries sustained could only have been caused by a police beating. In the face of that rebuttal, the plaintiff had to come forward with evidence sufficient to allow a jury to infer that a police beating occurred. The mere fact of injury was not enough. The trial judge found that plaintiff did not meet this burden.

I concede that at oral argument the City wasted valuable time in arguing (1) (as the majority opinion indicates) a totally unnecessary point—that there was insufficient evidence to draw the inference that the police were in the house prior to the arrest, and (2) that injuries to Walmsley's head "could have occurred before the fight even started, up to 48 hours before." Oral Argument Transcript at 38.

The relevant evidence supported the City's position. The uncontroverted narrative or historical facts are that the decedent had been in a brawl, that he had fought and traded punches with several men before being taken into police custody. There was no direct evidence that police used blunt instruments on him. There could be no permissible inference that the Philadelphia police used billy clubs on him. There was no proof that head-bashing with clubs was a long-standing police practice. You can neither assume nor draw a reasonable inference that such police brutality always takes place or took place here. From narrative fact "A," that the police took him into custody, you may not infer fact "B" that a police beating took place. For a passage of narrative fact to inferred fact to be valid, it must be according to a reasonable

probability that the conclusion flows from the evidentiary datum because of past experience in human affairs.

Clearly, the teachings of *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 116 (3d Cir. 1980), apply:

> When a trial court grants a directed verdict in a circumstantial evidence case, the court makes a legal determination that the narrative or historical matters in evidence allow no permissible inference of the ultimate fact urged by the opposing party. It decides that no reasonable person could reach the suggested conclusion on the basis of the hard evidence without resorting to guesswork or conjecture. To permit a jury to draw an inference of the ultimate fact under these circumstances is to substitute the experience of logical probability for what the courts describe as "mere speculation."

Appellant relied heavily on the testimony that when the mother and sister brushed the decedent's hair back from his face after the fight ended, they saw no lumps on the head. This is not probative evidence in a court of law. The witnesses simply said they did not see lumps. They did not say that they looked for lumps and had a reason for so doing. From this the appellant asks to draw an inference that there were no bruises on the decedent's head before he entered police custody. Such an inference may not be drawn here. It is an example of what logicians describe as the "Fallacy of Drawing an Affirmative Conclusion from a Negative Premise." *See* I Copi, *Introduction to Logic* 221 (7th ed. 1986). *See also* D. Fischer, *Historians' Fallacies* 47 (1970) ("The fallacy of negative proof is an attempt to sustain a factual proposition merely by negative evidence.") This type of reasoning is unacceptable because of the difficulty in sustaining a factual proposition merely by negative evidence. When an advocate determines that there is no evidence that B (bumps on the head) is the case; he or she is attempting to affirm or assume that non-B is the case. But all that is affirmed or assumed is that the advocate has found no *evidence* of non-B. The correct method of proceeding is to

find affirmative evidence of non-B. This may be difficult, but it is absolutely necessary if logical order is to be preserved. To prove a negative is sometimes an impossible task. Not knowing that something exists is simply not knowing. Similarly, not knowing that Walmsley hit his head during the fight with his brother does not imply that he did or did not hit his head.

Alice's experience with the White Knight comes to mind:

> "I see nobody on the road," said Alice. "I only wish I had such eyes," the King remarked in a fretful tone. "To be able to see Nobody! And at that distance!"

The Complete Works of Lewis Carroll, Modern Library ed. (New York,n.d.), p. 223.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GERALDINE WALMSLEY, etc.	:	
	:	
vs.	:	NO. 87-5182
	:	
P. O. ERNEST COLWELL, et al.	:	

ORDER

BEFORE Hon. Louis C. Bechtle

AND NOW, this 23rd day of May 1988, it is ORDERED that defendants' motion for a directed verdict pursuant to Rule 50(a) is GRANTED, as set forth this day in open court. The third party claim against Robert Walmsley is automatically dismissed.

ATTEST: BY THE COURT:

BY: MARION C. SCARENGELLI
Deputy Clerk

_____
Judge

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believe that they did it or didn't do it.

I think there are sufficient facts here for the jury to decide and if this Court were to rule in favor of the defendants' motion, then we would be taking that away from the jury.

With respect to the other issues, Your Honor, with respect to the 1985 issues, we cite in our brief a case called Simkowak, Miller, which talks about conspiracy under 1985

and 1988. That case held that, where officers witness a beating of a citizen and do nothing, an action would lie under those two sections.

Also, with respect to 1988, it is nothing more than giving us the right to bring a survival action, Your Honor, under state law and that's why it was brought up in the pleadings as to jurisdiction of this case.

I have nothing else, Your Honor.

THE COURT: All right. Have you assembled those exhibits.

MR. FROST: Yes, sir.

THE COURT: I would like to see them, please.

Take a 10-minute recess.

(A brief recess.)

(Reconvened.)

THE COURT: I have had a chance to examine the exhibits. We have seen some of them throughout the trial.

1059

Some of them are blow-ups of others. Some of them the Court has been furnished with.

The present matter before the Court is a motion of the defendants, all defendants, three of them, for what we call a motion under Rule 50 at the close of the plaintiff's case, and the jury would have to determine whether or not there has been sufficient evidence that has been offered that, allowing all reasonable and permissive inferences to the jury in favor of the plaintiff, whether or not there is sufficient evidence offered to that jury to allow them to draw those inferences that could result in a verdict for the plaintiff.

I have concluded, after analyzing the testimony presented and the exhibits, that in the present claims before the Court there is not sufficient evidence from which a reasonable, well-balance-minded jury could properly and reasonably

conclude that the plaintiff's claims as outlined to the Court could result in a verdict for the plaintiff.

I have to begin this by stating that everyone understands and feels how serious this matter is, and how much sympathy there obviously is under these circumstances that are indeed tragic, and that is obvious.

That, obviously, can have nothing to do with the procedural posture that the case is now in, as far as the Court is concerned.

1060

The case is brought under a number of statutes that require certain burdens of proof to be satisfied at this level under Rule 50, and what the Court has to decide is whether or not that evidence, if received as uncontradicted from the plaintiff's vantage point, would allow a reasonable jury, drawing reasonable inferences, to find for the plaintiff.

The Court doesn't believe it does.

I suppose we should address these claims as nearly as we can in regard to each defendant, although it is claimed that there was certain conduct by these defendants in concert. Under the 1983 claim, the principal claim here is the use by Officer Colwell of excessive force against the decedent. That is the principal claim.

It is contended, by reason of that, that the decedent's death was caused, and it is also suggested that Officer Valenti acted in concert with Officer Colwell, and that Lieutenant Carre stood by, as expressed by the plaintiff's counsel, idly by, and allowed these events to take place.

1061

The Court has considered the evidence offered by the plaintiff, including family members of the decedent, roommates of the decedent, neighbors and eyewitnesses, so-called neutral witnesses or certain partisan witnesses of the plain-

tiff's cause, and the Court believes that the uncontradicted evidence shows that on the night in question a brawl commenced on the second floor of this property that we have heard so much about on West Fisher Street, 226 West Fisher Street, and that, considering all the inferences and the evidence as offered by the witnesses for the plaintiff as being true, that brawl began around midnight or so on the second floor of this building, and it began as some sort of a disagreement or altercation between the decedent, who occupied, as a tenant, a room of that building, as did his brother Robert, who owned the building, and the incident was caused, apparently, by some disagreement between Robert and the decedent as to the manner in which the premises would be used.

Again accepting the evidence as offered by the plaintiff's principal witnesses, that is, the nondefense witnesses, and assuming that would be true, the argument had to do with the presence in the decedent's room of an unwanted female—that is, unwanted by Robert and the others—and for whatever reason, the argument started, it began. It elevated to what has been described in a number of ways, but it was perfectly plain that it was an extremely violent encounter on the second floor, and there ended up to be two or three others who were trying in some way to restrain the decedent, who was the largest of the group, or at least very large, and extremely strong and difficult to restrain.

1062

During this second-floor encounter, one of the combatants, Billy Ray, who testified here, who was a tenant and indeed a friend of the decedent, was struck in the face by the decedent and received a broken nose, and in the bedroom of the decedent it took three of the persons present to try to restrain and hold the decedent to the floor.

The fight in the bedroom or the brawl in the bedroom ended up on the floor, with the decedent lying on his back on the floor. And at or about that time the decedent, who everyone agrees during this fast period of his life was in a rage, totally uncontrollable physically and apparently emotionally

he was described by others who saw him on this evening at this time as being in various states, some of which could have been the fruit of his ingestion of substantial quantities of barbiturates at lethal levels—for whatever reason, he was extremely combatant, and after the fan incident, it is a little unclear but the brawl or parts of it then took place downstairs.

The decedent had expressed in some way to the others that he was going to go downstairs and destroy certain property. There was a fish tank on the first floor that Robert maintained, and there were other valuables there, and there were photographs offered in evidence, and there was testimony of how the property was maintained. It was kept orderly and kept fully furnished.

1063

Apparently the decedent went down the steps or ran down: either version would suggest that the encounter was still going on, three behind him. When the decedent reached the bottom, one of those who had reached the third step either tackled him or jumped on him. Those two came to the floor.

Then the three men still behind the decedent, all three of those men, apparently, were necessary to push the decedent out of the front door violently and presumably in an effort to get him out of the house to prevent things from being broken. During all of this there was shouting and hollering and a substantial exchange, apparently, of hostility between all the parties involved.

A number of photographs have been offered into evidence, and I think P-21, P-8, P-24, and P-15 show the front of the property. These were taken at a time when there was snow on the ground, and I guess everyone stipulates it was a different season, but the houses themselves are essentially the same. They can be seen as being neat row homes, all with what appear to be enclosed type fronts, that is, no open porch. there are four steps, concrete steps to the front door, with a metal rail, and then a walkway which appears to be six feet of cement and then three steps down to the sidewalk.

1064

Along the sidewalk edge is also a handrail on the left, of metal, and also running the entire length of this series of homes is a concrete curb on the sidewalk and then the sidewalk itself. In between each of the homes are small lawns surrounded by concrete walkways and places where trash cans can be kept.

Separating each of these row homes are what appear to be brick party walls or columns that protrude what appears to be six inches from the face of the building, and that also appear to be about a foot wide, separating each of the homes.

It is important to realize the configuration of this neighborhood as this brawl rolled out through the door onto the sidewalk and onto these lawns. Several witnesses saw this, and some of the testimony is that, I think one of the plaintiff's witnesses, possibly Mr. Klein, had said that Robert came out and either slid or fell down one of those rail ways and landed on his backside as he came out the door.

Then the testimony is from those who were present that Robert and Thomas got into a first fight. As expressed by one of the witnesses, Mr. Ray, they were boxing for about five minutes. They were trading punches, they hit each other in the face two or three times.

1065

There is testimony from Robert that he hit Thomas with his fist on his face two or three times. Robert said the fight rolled or roamed between the two of them between these two houses, 226 and then next door, 228 and 230. Robert testified they fell to the ground. Two or three more of the men involved also became further involved in trying to hold Thomas to the ground.

There is testimony that Thomas and Robert both hit the wall twice. That was from Mr. Ray. And there is also evidence that the decedent believed he had been beaten up by these people. He stated that after the police arrived and when they were separated.

The police were called for the first time. There were two police visits to this scene.

Officer Grove testified, as did Officers Valenti and Colwell and some others, that the police arrived, and there was still a considerable amount of hostility between the combatants, and the tempers were elevated by all the parties.

Apparently, Robert had asked someone to call the police. The police did come, and Robert found himself being the one who might be arrested, and indeed he was.

He was arrested with one of his colleagues, Carl, who had been assisting him, presumably because they were not cooperative with the police. In any event, they were arrested and taken to the Roundhouse.

1066

Thomas was told to leave, and he left. He went to his mother's home. When he visited there, family members were present. They were awakened by his presence. And he had a swollen left side of his face and eye. He had a cut lip. He was extremely difficult to talk to, difficult to engage with or reason with, and family members tried to get him to calm down, but he was apparently determined to have this encounter with Robert and the others continue on.

He declared to those present that he was going to leave, go back to the house, get a gun, shoot these people, and he was getting, as expressed by all those who saw him, in many, many ways totally out of control.

He did leave. He left the house; and his mother, out of, no doubt, genuine concern, called the police and reported that her son had just left there, he said he was going to get a gun and shoot some people up at 226 West Fisher Street.

The police arrived a second time.

There was testimony by Billy Ray that Thomas did return to that house and, as expressed by Mr. Ray, destroyed the inside of the house.

Neighbors, Mr. Chalmers, Mr. Klein—Mr. Chalmers especially—and this again comes from the witnesses from the plaintiff, and the Court accepts the testimony and all of the

reasonable inferences from it—appeared where they lived. Chalmers appeared from his home. They heard noise. they were awakened by it, and outside they saw the police presence. And there came a time when the number of police could have reached eight or nine or possibly more members.

1067

The testimony is that, especially from Chalmers, that he saw police officers in and about the house. He believes he saw two come out of the house. He believed he saw Thomas with them, walking. And everyone who testified, who saw Thomas at that time, has testified that he was calm, he was cooperative, he was disheveled, he had a swollen left eye, he had a cut lip, he had some blood.

There is testimony from Colwell that he was shouting or hollering and making noise.

There is testimony from Valenti that he was argumentative in his tone.

The arresting officer was principally Officer Colwell; Valenti was his partner. They both testified, and their testimony has obviously and understandably some differences, but essentially, principally, it is the same, that they took him into custody, Colwell did. Colwell put the handcuffs on him. Colwell and Valenti walked him to the van. The van doors were open. He either stepped into or was assisted into the van, he was placed on the seat. There was no one else in the van.

It must be remembered here that this is Colwell's second visit this evening to this property. The first visit was when the police were called by reason of the brawl that came from the second floor to the first floor to the front steps to the three or four houses in this row.

1068

Colwell was present. Colwell was in the house with the decedent at that time, together with Officer Grove. So, Colwell visits this property with the knowledge of what happened a brief time before, the first time.

The decedent is placed in the van. The van then leaves with Officer Valenti at the wheel, Officer Colwell in the other seat. They go, presumably, close by, within five, maybe 10 minutes. There has been various testimony, but the Court will take judicial notice it is not far from that location to the police district.

The van doors are then opened and when they are opened, the decedent is on the floor of the van. The officers tried to arouse him but, other than one very brief reaction to the ammonia, he doesn't react. It is reported to the police officer in charge, the corporal in charge of the record keeping at the facility, and they are directed to take him to the hospital, the Einstein Northern Division, which they do, which also is somewhat close. They take him there to the emergency room, and the emergency team at that hospital triggered what they call a code or code blue process, and they attempted to revive the decedent, and they were unable to do so.

1069

His mother visited him at the hospital. She was led into the room, and she examined the body and she said she felt a number of lumps along the top portion of the skull. There was other evidence of those injuries as well. Dr. Romy testified to many, many of those injuries.

Essentially the reports that have been offered into evidence have been testified to at length by the witnesses, but the principal features offered by the plaintiff, which the Court will, essentially, accept as being true and reasonable inferences to be drawn from those reports, is that Dr. Romy testified—we have P-26A, which is a postmortem report of the medical examiner—and Dr. Romy, I believe, testified to this and the others. He testified that the cause of death was the swelling of the brain. He said there were no cuts or fractures, but it was the swelling of the brain. And he agreed with the report that it resulted from blunt impacts to the head.

The report says head and face. Dr. Romy did not believe that the striking of the face itself would have caused that type of swelling.

Dr. Romy had no knowledge or opinion about the presence of any toxic substances, and his opinion was strictly based upon the swelling of the brain, and he described it in some detail, how the swelling of the brain was caused by the blunt impacts, how that could cause the death.

1070

There was also testimony from Dr. Miller, neuropathologist, who testified that there were multiple blunt injuries to the head, and he testified that this could include multiple blunt injuries to the head by instruments which he indicated could include a fall downstairs, as well as any other blunt type instrument.

He specifically said that a wall or stairs could cause these types of injuries.

The Court believes that there is no question but that the facts advanced by the plaintiff's witnesses, drawing all reasonable inferences, justify—that is, that there was probable cause—that there is no question for the jury to decide that the decedent was subject to arrest by reason of the application of the provisions of the Criminal Code touching upon disorderly conduct.

What must be kept in mind here is that the officers, first Officer Colwell and Officer Valenti, who was functioning in conjunction with him, had been to the premises before. That is the knowledge they bring later.

Later, they bring with them knowledge that has been offered and received that there was a noise in and about the property. There was apparently glass being broken, and if Billy Ray's testimony is to be believed, the house was in the process of being destroyed.

1071

Colwell said he heard, in addition to that, the decedent shouting at the house or at or about the house, and Valenti said he heard at that particular hour of the day and in that particular neighborhood a voice that was sufficiently loud enough to justify an arrest for disorderly conduct.

Section 6503 of the Criminal Code, Title 18, provides that a person is guilty of disorderly conduct if, with the intent to cause public inconvenience, annoyance or harm, or recklessly creating a risk thereof—and then it goes through a number of things, one of which is to make unreasonable noise.

It just seems there is no factual doubt about the fact under all the circumstances here, that the arrest was justified.

The probable cause, as a matter of law, is established under the facts established by the plaintiff.

By reason of there being sufficient support for the arrest, there is also sufficient support for the taking into custody, which would be the basis for claiming liability for false imprisonment.

As far as excessive force is concerned, there is no question but that all the parties who were called here as experts—let's put the toxic feature aside for a moment, the drug feature aside for a moment. Just put it aside.

1072

There is no question but that the decedent, at the time of his death, had in his system, as has been described here, high levels or certainly lethal levels of barbiturates, described in more technical detail in the testimony, as well as high levels of Valium. The part, it would seem, that plays here is in respect to the finding of probable cause for arrest of the decedent at the time he was arrested.

There is some testimony that Thomas's speech was somewhat slurred. That was some testimony. If that is so, that could be a basis for that.

There is also Officer Colwell, who made some reference to his either staggering or whatever, and that may be the basis for that.

At this juncture that feature of the case, it seems to me, could be put aside.

If we put aside the drug feature and just address the question of excessive force, it seems that none of the experts called by the plaintiff did, nor indeed could they be in a position to say that the events as described by all the wit-

nesses in total from the beginning of this, what I refer to as a brawl, which is what it was, until the time that Thomas was taken into custody, none of them can say that that conduct could not have been the basis in some way for the decedent having these injuries.

1073

Indeed, some of the witnesses said that the parties did hit the concrete wall, some of the parties said that there was an exchange of blows. To simply infer that because the police took custody of this person for 30 or 40 minutes, which provided an opportunity, is the basis for the jury to conclude that they inflicted the type of harm that the plaintiff claims, is simply not justified under the evidence, and the jury would be totally guessing that that happened. There is not one witness who has testified as to any offensive touching of any kind by any police officer to the decedent. There was no offensive touching of any kind. There is no evidence of any kind of any object or no evidence, indeed, of even any shouting or screaming or other evidence of police offensive touching.

Now, under our system, I suppose it is possible that that could have happened, but in a proceedings such as this there has to be more than just a raw possibility to give to the jury to try to guess as to what happened. And that's all the Court believes the jury could do here, is to guess that there would be a time when either in the house or in the van that there was some sort of attack by either Colwell or Valenti.

Indeed, there is a serious question in the Court's mind as to whether or not, in view of all the things that occurred regarding—I'll refer to it again as a brawl—whether, if there was a touching, it could be characterized as excessive.

1074

Police officers are permitted to offensively touch persons in their custody, and you can only recover if those touchings are excessive. So, merely showing that they were touched, that is, that they were touching the decedent, or either of them did, it would still not be sufficient. The jury would have

to guess that the force used was excessive and not just offensive.

But there hasn't been any evidence, either direct or circumstantial, other than the raw opportunity, alone, to show that either of these officers touched the decedent in an offensive manner.

The only touching that was seen was seen by the persons who are not defense witnesses, but I would call them witnesses who are more partisan to the plaintiff's claim, and all of those references are to a touching that was cooperative, conciliatory, nonoffensive, and not in any way in a hostile environment.

When the evidence is such that, without weighing the credibility of the witnesses—and I can't weigh credibility, I'm accepting the witnesses' version that has been given here, and again, I repeat, it is a tragic, tragic set of circumstances, but when the evidence is such that, without weighing the credibility of the witnesses, there can be but one reasonable conclusion as to the verdict, the Court is required to direct that verdict. I think the only verdict would be that the jury would have to guess that, in the brief interval when the police had custody of this person, they struck him in such a manner as to cause his death, and none of the events that occurred in the entire preceding evening played any part in that. The jury would simply have to guess at that.

1075

Another feature of it that has to be addressed is the extent to which we have both officers. We have both Colwell and Valenti.

What evidence is there that, if there was a striking and if there was an excessive force, that both were involved? We would have to infer that they were acting in concert, and there is no evidence that they were acting in concert other than that they were assigned that evening in the same vehicle.

There is no evidence that anyone witnessed either of the police officers offensively touch or even had an offensive conversation with the decedent.

There is testimony, that when they had him in custody, he walked normally, other than the one brief suggestion by Colwell that he may have staggered.

He spoke normally, apparently. He got into the van unassisted or just with the kind of an assistance that persons would need because they are handcuffed, and he wasn't thrown or pushed or wasn't fighting.

1076

There is no evidence that the officers' clothing or equipment or vehicle were in any sort of disarray, from any witness.

There were persons at the hospital who saw these officers who brought him in. There was no evidence that there was any disarray or any dishevelment with respect to those officers.

As far as Lieutenant Carre is concerned, I don't know what plaintiff's position is respecting him. What didn't he do that he should have done? He was in a supervisory capacity. There is no evidence that Lieutenant Carre did anything that could be said to have been improper. He didn't touch the decedent offensively.

There is no evidence that he saw the officers touching him offensively. There is no evidence that there was any oral encounter between Carre and any of the officers and the decedent.

There is some suggestion that he ignored certain medical problems that the decedent had, but the plaintiff's own witnesses have testified that he simply had a black eye and split lip. If that's all Lieutenant Carre saw, what is the burden? What was his burden under the circumstances?

The plaintiff can't have it both ways. You can't say there was nothing wrong with him, he walked normally, he only had a split lip, only a black eye, and then say you were indifferent to obvious and clear medical needs.

1077

The jury would have to guess. There is clearly insufficient evidence against Lieutenant Carre in any role, and the

Court rules in favor of the defendant, grants the motion under Rule 50 as to all claims, including state pendant claims.

The same standards apply under state law. A police officer can use force under state law in order to carry out his duties to arrest or to maintain custody.

There is no evidence of any false imprisonment even under the state claim. The motion under the state claim is granted. So ordered.

The exhibits should be kept by the parties to file all post-trial motions or post-trial proceedings, as they desire.

Anything further?

MS. MOUZAYCK: No, Your Honor.

MR. FROST: No, Your Honor.

THE COURT: The court can record the oral opinion of the Court as being the Court's verdict granting the motion under Rule 50 as the final order in the case, subject to review and appeal.

MS. MOUZAYCK: Your Honor, would it be permissible to get a copy of that?

1078

THE COURT: You can apply to the court reporter and he will prepare a certified opinion.

THE COURT: Mr. McConeghy?

MR. McCONEGHY: Is the claim also dismissed against the third-party defendant?

THE COURT: It automatically is, because the third-party claim is dependent upon the defendants' claim. The third-party claim is dismissed.

MR. McCONEGHY: Thank you.

THE COURT: So ordered.

I just want to make sure one thing is plain here, because I know this is often misunderstood. This is a tragic, tragic matter, there is no question about that. We all would like to take that day back. Everybody in this room would like to take that day back. We can't do that. And it is difficult. These are difficult cases. The Court

has to make a decision. I have made it. If I am wrong, the higher court will review and, presumably, correct it. I don't think I am wrong. I have spent a considerable amount of time reviewing all the material as the case progressed. There are certain standards that I must follow, and I think it is appropriate, so it is not misunderstood that this is the Court's view of it. It is an extremely tragic affair. Everyone in this room knows it.

So ordered.

Morace—Direct

345

photographic equipment and also a briefcase which would consist of any materials that he would need to process the scene.

Q: Now, the scene here would be the van; is that correct?

A: Yes.

Q: And you entered the van; is that correct?

A: Yes.

Q: And did Mr. Conches enter the van?

A: Yes, he did.

Q: And did you find anything in the van?

A: Yes. Located on the floor of the van was what appeared to be an ammonia capsule which is used to revive someone who has fainted.

Q: Now, did Detective Harmon say anything to you about this ammonia capsule at this time?

A: At that time, I believe he did.

Q: What did he tell you about the ammonia capsule?

A: I don't know the exact words that he explained to me but basically it was that there was a person who was placed in the van by the police, and that after he was placed in the van, this particular person passed away somewhere in the course of transporting—I'm not—that I'm very vague on. I don't have any information about that.

Q: Was this capsule to be used as any type of evidence in your job?

A: Well, we would—I would be guided by what Detective Harmon requested of me.

346

Q: Did you retain this capsule?

A: No, we did not retain it.

Q: Were you requested to retain this capsule?

A: No, I don't believe we were.

Q: And on what portion of the vehicle did you see this capsule?

A: Approximately a few feet into the vehicle.

Q: So that would be—

A: In the middle of the van, approximately.

Q: In the middle of the van?

A: I believe so. You know, in the middle of the—

Q: Did you find any blood in the vehicle?

A: No. We were informed to check and search for blood. There was no blood found in the vehicle.

Q: None at all?

A: No blood.

Q: No blood sustains?

A: Just sustains from other incidents that took place, such as dirt sustains, rust sustains from the vehicle. The vehicle was not a new vehicle. It had been on the street for a while.

Q: And you don't recall seeing any blood sustains in the vehicle?

A: The only area that was brought to my attention was the capsule.

347

Q: The area of the capsule?

A: Yes—the capsule itself.

Q: When you say the capsule itself, can you tell me what you mean by that?

A: Well, normally a capsule is white in color and it is approximately an inch or so, and it is cylinder shaped. And I do remember seeing a stain on the capsule. Now, whether it was when the capsule was broken, I don't know. Sometimes they emit an iodine type color. So it appeared to be a reddish color on the tip.

Q: Well, didn't it appear to be blood to you?

A: It appeared to resemble blood, yes.

Q: In fact, you took a deposition in my office, did you not, sir?

A: Yes.

Q: About a month ago?

A: Yes.

Q: And in that deposition you stated that the capsule was saturated—"saturated" was the word you used—with blood, is that correct?

A: I did at that time. And if I may express my—my findings, just talking about other people who have used the capsules, and that is that when the capsule is crushed, sometimes it emits an iodine-reddish substance that could very well appear to be blood.

348

Q: Sergeant Morace, it is your duty to collect evidence, is that correct?

A: That's right.

Q: And, I think you have testified that you are supposed to collect fibers and blood and things of that nature?

A: If it is called upon us to collect that, yes.

Q: And if the investigating detective tells you not to do that, then you don't do that?

A: We'll be guided by what—he is running the investigation and we will inform him of what we feel we should do, yes.

Q: And at that time you thought that that was blood, and it was only later that you learned that it may not have been blood, isn't that right?

A: That's true, yes.

Q: And I think upon finding it and seeing it was blood, did you point it out to Detective Harmon at that time?

A: I believe at that time the detective was aware of what we believed that to be. It was a capsule that was placed, from what I understood at the time, in the nostril area of the complainant, and that in his opinion from what I gathered, it was blood.

Q: My question is not whether he was aware of; did you point this out to him that there was blood there, what appeared to be blood?

A: I believe it was mentioned, yes.

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Q: And when you mentioned that to him, what was the reaction of Detective Harmon?

A: That I don't recall.

Q: Did you ever take that specimen?

A: Not to my knowledge.

Q: Did Mr. Conches ever take that specimen?

A: Not to my knowledge.

Q: I'm going to show you what has been marked—

MS. MOUZAYCK: May I see it?

MR. FROST: Yes (Showing exhibit to Miss Mouzayck).

BY MR. FROST:

Q: I'm going to show you what has been marked as Exhibit P S1. Can you identify that, sir?

A: Yes, that's the ammonia capsule.

Q: Why don't you first identify the overall picture itself?

A: This is the floor of the wagon, and there is the capsule.

Q: And that is where the ammonia capsule is, right in the middle; is that correct?

A: Yes, right here.

Q: Can we circle that, and by that circle write "SM" for "Sergeant Morace"?

A: (The witness marked the photograph.)

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Q: Thank you. And that is where the capsule was and what to you then appeared to be blood; is that correct?

A: Yes.

Q: And no specimen was taken of that; is that correct?

A: To the best of my recollection—

MS. MOUZAYCK: Objection, Your Honor.

THE COURT: Well, what do you mean by specimen?

MR. FROST: A specimen of that sample or a sample of that blood.

THE COURT: All right.

BY THE COURT:

Q: In other words, was part of that removed and saved or examined or anything as far as you know?

A: No, Your Honor.

THE COURT: All right.

BY MR. FROST:

Q: Do you know whatever happened to the capsule?

A: No, I do not.

Q: And do you know if the capsule was ever—do you have any personal knowledge of whether or not the capsule was put into the nose of Thomas Walmsley?

A: No, I do not. Just from what I have—

BY THE COURT:

Q: We just want to know if you, yourself, in your own observations, know that.

A: No, Your Honor. No.

351

BY MR. FROST:

Q: I am going to show you what has been marked as Exhibit P-52. Can you identify that?

A: Yes, this is the interior of the police wagon.

Q: And there were just two photographs taken of the interior of the wagon; is that correct?

A: I believe so, yes—no, that I'm not sure of, exactly how many were taken of the interior, but from the report, it indicates that there were two.

Q: You have a report, do you not?

A: Yes.

Q: And from that report it shows that five photographs were taken; is that correct?

A: From this report it states that there were four.

Q: Four taken?

A: Yes.

Q: Well, weren't five taken and only four developed?

THE COURT: What does the report say?

MS. MOUZAYCK: The report says four, Your Honor.

THE COURT: Four what? Taken? Developed?

MS. MOUZAYCK: Four pictures came out is what the report says.

THE COURT: All right. When we use the words in the report, we won't have this fencing with words.

MR. McCONEGHY: Your Honor, can we read what the report says?

THE COURT: Is this his report?

THE WITNESS: No, this is the report from technician Conches.

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BY THE COURT:

Q: Is part of what you did in that report?

A: (No response.)

BY MR. FROST:

Q: Is your signature on the bottom of that report?

A: Yes.

BY THE COURT:

Q: Did you put put the information in it?

A: No, Your Honor.

Q: Why did you sign it?

A: Because it is my responsibility to review all the reports that come through.

Q: And you reviewed that one?

A: Yes, Your Honor.

Q: Is it accurate?

A: Yes, Your Honor.

Q: What does it say about the number of pictures that were taken or developed?

A: It says four were taken.

Q: Four taken?

A: Not taken—

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Q: Read what it says. What does it say?

A: It says that on such and such a date, at approximately 600 hours to 620 hours, Technician William Conches, from the Mobile Crime Detection Unit, photographed the below listed views of police van 3502. Number one was a view showing the rear and right side of the van.

Number two was a view showing the interior of the van; number three was a view showing ammonia capsule on the floor of the van.

And four was a view showing the front of the van.

Q: From the outside, is that what that means, from the outside?

A: Yes, Your Honor.

Q: Is that accurate as far as you know?

A: Yes, Your Honor.

THE COURT: All right. Let's go with that.

BY MR. FROST:

Q: What am I showing you, officer?

A: This is a contact of the negatives.

Q: Of those four photographs?

A: That's correct.

Q: And how are they numbered, sir?

A: One, three, four, and five.

Q: Where is number two?

A: I have no idea.

354

Q: Did you ever ask Mr. Conches where number two was?

A: It's very possible it was a duplicate. It is not uncommon.

Q: I understand that sir. Did you ask where Mr. Conches where number two was?

A: No, I did not.

Q: Did you ever inquire as to the contents of number two?

A: No, I did not.

Q: Did you ever make a record as to what number two was?

A: I personally did not.

Q: And that's not contained on the report that you just read; is that correct?

A: That's correct.

Q: After you received those instructions from Detective Harmon, how long did you remain in the bay area?

A: Approximately 20 minutes.

Q: Besides taking those photographs, did you get any other evidence?

A: No.

Q: Now, you showed us an Exhibit P-52, is it?

A: Yes.

Q: What is that on the bottom right hand corner?

A: On the bottom left-hand corner?

Q: Bottom left. I'm sorry. Is that a gurney?

A: Oh, okay. This is a gurney, right.

514

Romy—Direct

Q: Even though you didn't author any of this report?

A: No.

Q: You are explaining what you think the words mean on Dr. Fillinger's report?

A: Correct. This is the way a neurosurgeon reads it.

Q: In other words, you didn't see any discolorations, yourself?

A: No.

Q: But you assume someone did and that's why they wrote it down; is that right?

A: Correct. I never saw Mr. —

THE COURT: All right. Go ahead.

BY MR. FROST:

Q: Continue, doctor.

A: For the face, the description shows that there is an injury to the lower part of the eye, the area that we call the infraorbital—below the orbit—and swelling of the upper lip.

Contusion of scalp. Scalp is where are the hairs. It is usually difficult to see the contusion of the scalp because of the hairs, so this is described after the scalp is incised and turned by the physician. You can see from inside the scalp the bruises of the scalp. So from outside we don't see them but the scalp has to be incised about from ear to ear and flipped over so we can see the inside of the scalp hair and see the bruises, and there were contusions of the scalp.

515

Q: Doctor, when you say contusions of the scalp and the scalp is flipped over, can you tell us how that is done; do you know how that is done?

A: Yes, the scalp is incised from one ear to the other ear—

Q: When you say incised—

A: Cut.

Q: Cut?

A: Cut and flipped over.

Q: So it is turned over?

A: Correct. Underneath, we have "acute cerebral edema." Acute cerebral edema is brain swelling. The brain is inside the skull. The scalp is outside the skull and the brain is inside the skull. I will go over this again in a moment.

And we have "contusion and laceration of buccal mucosa." That means bruises and cuts into the mouth.

I will not go at this point in time over the rest. Just I want to say that a tracheotomy is an opening in the trachea that the patient had when he arrived in the hospital, and he needed to have some way to give him oxygen. So this is part of the treatment of the patient, not of an injury to the patient.

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And the other problems that we have as pulmonary edema, splenoleptomegaly, hypertensive heart disease, and cordomegaly, are not part of any significant neurosurgical findings in this case, so I would just like to focus the attention on the blunt impact to the head and face, contusion of scalp, acute cerebral edema, severe, and contusion and laceration of buccal mucosa.

Blunt, we use the term blunt to say it is not cutting. Blunt: it made a shock, it bruised, a shock wave, but had not actually made an opening, a slice into the skin. It is usually done by some type of object which has no cutting edge and no sharp edge but kind of a round surface coming with some speed against the skin, and the skin covering the bone has very little room to move and usually some vessels bruise there and make a blue mark.

So blunt means noncutting and, therefore, no blood came outside the skin but blood remained into the skin.

Contusion of the scalp, I explained it.

Acute cerebral edema, it is something which is very

peculiar to the brain. It is the way for the brain to react to injury and damage.

The brain is the most important organ of the body and it is localized inside the skull, and the skull is like a box which cannot increase its size. So, if the brain takes more water and swells, it has no room, and pressure

* * *

521

Q: And where is that located?

A: Which was located in the left temporal region of the scalp.

Q: When it says 13 by 9 centimeters, do you know how big that is in inches or perhaps you could tell us?

A: 13 centimeters would be nine inches.

BY THE COURT:

Q: Show us with your hands how big that would be.

A: Like the palm.

Q: Like the palm of your hand?

A: Yes, without the fingers.

Q: All right.

A: So this was 13 by 9—

BY MR. FROST:

Q: When you use the word "hemorrhage" can you tell us what a hemorrhage is?

A: It is an infiltration of the scalp by blood. When a blunt injury happens to the scalp—the scalp is a thick skin. The scalp becomes compressed against the bone of the skull, and the blood infiltrates the scalp and does a hemorrhage.

Q: That is internal as opposed to being external?

A: It is inside the scalp but outside the skull, it is not into the brain. It is into the skin of the scalp.

Q: Would you be able to see that?

A: As I explained, you have to turn the scalp to see the other side because the scalp is covered by the hairs. And the patient had hairs. I'm sorry to use the word "patient", it was not my patient, but as a doctor, it is a human being.

522

Q: Continue, doctor.

A: There was a four by five centimeter area of dark red-purple hemorrhati overlying the left forehead area, and a two by five area of hemorrhati involving the left forehead at the hairline. So he was talking about those two hemorrhati.

A two centimeter in diameter area of blue purple hemorrhati to the right parietal region of the scalp.

Q: The parietal region of the skull, we have the diagram there, but could you point to your head and show us where that is?

A: Temporal, parietal, frontal: so there were three in this location on the left side (indicating), and two in this location in the right side.

Q: Toward the rear, the parietal is toward the rear?

A: Correct.

Q: And the temporal is toward the front?

A: But they were both not very far back. They wouldn't be too far behind the ear. Frontal-temporal, it is mostly in front of it; back part of the temporal, not below the ear, not behind the ear.

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Q: Thank you.

A: Basically, the patient has had injury from the right side and from the left side to the top of the head.

The injuries that were on the face are really not having any effect into the brain, but the injuries of the skull are the ones which have triggered inside the brain the swelling of the brain.

The brain did swell as much left as much right because most of the injuries were bilateral. So the whole brain has swollen. It is not one part of the brain which swells and the other didn't. Both parts of the brain were swollen, and the pathological report shows that both sides of the brain were swollen, and down the tonsils of the cerebellum did herniate by the pressure of the brain above.

Q: Doctor, why wouldn't the facial injuries cause the brain to swell?

A: It is not common. Most of the times the injuries having a direct impact and close by to the brain, just separated by one layer of bone, are going to be the ones which are going to determine brain damage.

The face, there is a full facial series of bones which go between the nose down to the brain which most of the times are going to break, to fracture before getting into the brain.

The brain is protected from injuries to the brain by the whole face.

* * *

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Romy—Direct

Thomas Walmsley?

MS. MOUZAYCK: Objection, Your Honor.

THE COURT: I'll let him render that opinion. He can be cross-examined as to the basis for it.

BY MR. FROST:

Q: Do you have an opinion, doctor?

A: Yes, I do.

Q: What is that opinion?

A: It is the brain swelling and the herniation of the cerebellum.

Q: Caused his death?

A: Yes.

Q: And what is the basis of your opinion, doctor?

A: The finding at autopsy of brain swelling and tonsilar herniation and death of the patient.

Q: Doctor, what caused the brain to swell?

A: In this case?

Q: Yes.

A: In this case are the injury that the patient sustained on the skull, on the top of the head.

Q: Doctor, are they the five injuries that you have outlined: are those the injuries you are referring to?

A: Yes.

Q: That these five injuries—

THE COURT: Let him tell us.

MR. FROST: Okay.

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BY THE COURT:

Q: What caused the brain to swell?

A: In this case?

Q: In this case.

A: Correct. Are the injuries which I outlined on the top of the patient's head.

THE COURT: All right.

BY MR. FROST:

Q: How did the brain swell as the result of those injuries, doctor?

A: The impact of the blunt trauma to the top of the head was transmitted to the brain cells, and the brain cells got injured. When they were injured, they absorbed fluid and they swelled.

MR. FROST: I have no further questions.

THE COURT: Cross-examine.

CROSS-EXAMINATION

BY MS. MOUZAYCK:

Q: Dr. Romy, my name is Donna Mouzayck. It is a pleasure to meet you.

Sir, from the outline that you gave in the courtroom today, am I correct in understanding that, other than the one to two years of training in neuropathology in school, you did not further pursue your career in the

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Romy—Cross

except giving an idea that it was not a cutting object but a blunt object.

Q: And that could include numerous objects?

A: Could include numerous objects.

Q: And the kind of object we would be looking for would be a hard, brittle object?

A: More consistent with hard object?

Q: Something like if someone got hit with a beam over the head that fell down from scaffolding, that could cause some blunt trauma to the head, correct?

A: If the beam is round.

Q: And if someone had fallen down on some steps, a hard cement step could cause trauma to the head?

A: A hard cement would not be the perfect example because of the angle that the steps have. Hard cement would have a significant element of cutting.

Q: Assuming that the step was rounded, that could cause trauma, right?

A: Yes.

Q: As long as it was rounded?

A: Yes.

Q: And if we had a round rock imbedded in the ground and it had a round surface to the rock, that could cause trauma to the head?

A: If the rock has not sharp edges.

* * *

any journal.

Miller—Cross

Q: Now, you testified earlier that you never examined the body of Thomas Walmsley. I assume that you have never actually seen the brain of Thomas Walmsley, either, to date, have you?

A: That's correct.

Q: Now, you mentioned earlier that, by blunt trauma, you meant something that was a nonsharp instrument. Yesterday, Dr. Romy testified and he described blunt trauma as basically anything rounded that didn't have a cutting edge. Would you also agree with that?

A: With the second half, that it doesn't have a cutting edge, yes. It doesn't have to be rounded.

Q: And I think that you said that, in fact, a fist could be an instrument of blunt trauma?

A: Yes.

Q: And that if you saw four or five hemorrhages on the brain, if there were four or five punches, that could in fact cause that kind of trauma to the brain?

A: Theoretically, yes. It is rather difficult to put that together, though, as phrased.

Q: And there are other instruments of blunt trauma, as well, as fists; is that correct?

A: Many of them.

Q: And I think you mentioned one of them could be a wall?

* * *

instrument that actually caused the blow to the head, can you?

A: Oh, no, I don't know what instrument it was, no.

MS. MOUZAYCK: Thank you, Dr. Miller.

THE COURT: Mr. McConeghy.

BY MR. McCONEGHY:

Q: Dr. Miller, is the medical examiner's office in New York the largest in the country?

A: I believe so.

Q: In examining the medical examiner's report, there was no indication that there were any facial fractures, was there?

A: No. There are some facial soft tissue injuries but no fractures.

Q: Would it be your opinion, then, doctor, that the injuries that appeared on the decedent in his eye area and lip area were not a factor in the brain swelling?

A: They might have had a minor contribution but I don't think that they were the important factors.

Q: And what do you think were the important factors, doctor?

A: The multiple soft—the blows associated with the soft tissue injuries described by the medical examiner in the scalp over the calvarial part of the head, in the hair.

Q: And did these multiple contusions cause the herniation in the brain?

A: Well, strictly speaking, no, in that the contusions are the effect of the blow. The herniations are caused by the brain swelling, and the brain swelling is another effect of the blow, just as the contusions are. They are the marks of the agent, whatever it was.

Q: But these blows to the head set forth the process in motion that led to the herniation; is that correct?

A: That's correct.

Q: And do you agree with the medical examiner's conclusion that there was a blunt impact to the head?

A: Yes.

Q: Earlier you had been asked, doctor, if a fall on steps or banging against a wall or falling on a rock would likely cause these types of contusions to the head. With these types of injuries, say, a fall on the step or a bang against the wall or a fall on a rock, is someone likely to develop abrasions along with that?

A: Yes, there are. Also, if I may, if I understood the question I was asked correctly, I wasn't asked whether rocks or steps or so forth could cause what you just asked me. What I was asked was whether those were examples of blunt trauma, and I think there is a distinct difference.

Q: Based on your examination of the medical examiner's report and your experience, doctor, do you have an opinion within a reasonable degree of medical certainty, if these injuries to the head were caused by a fall on cement?

MS. MOUZAYCK: Objection, Your Honor. This is not his witness.

THE COURT: The witness, I think, can answer that.

BY THE COURT:

Q: Do you understand the question?

A: I do understand the question and I do have an opinion.

BY MR. McCONEGHY:

Q: And what is that opinion?

A: The injuries described by the medical examiner are highly unlikely to have resulted from a fall.

Q: Are they likely to have resulted from a single bang against a wall, a single bang of the head against the wall?

A: That's not possible.

Q: Are they likely to have occurred from falling on a rock?

A: No.

Q: Is it possible that those injuries could have resulted from being clubbed with a night stick?

A: That's one possibility, yes.

Q: Is it possible that those injuries could have resulted—

THE COURT: I don't think you can lead this witness. He is not adverse to your position in this case.

MR. McCONEGHY: I thought I was on cross-examination, Your Honor.

THE COURT: Well, whether you are on cross-examination doesn't determine whether you can lead the

* * *

there was a wider space of time in which they may have occurred?

A: It depends on which limit you are talking. For instance, if they have been done over a week's time, there is no indication contrary. They are all below—in the same 48 hours range.

For a more precise dating, I think we have to go what we call microscopic section of the hemorrhage to date them less than 48 hours.

Q: It is your opinion that the injuries occurred in less than 48 hours. Is it your opinion that some of those injuries may have occurred in a shorter or longer period of time than the other injuries?

A: Into the 48 hours?

Q: Within the 48 hours.

A: It is hard to tell without having a microscope histology.

MR. McCONEGHY: All right. I have no further questions. Thank you.

THE COURT: Mr. Frost?

REDIRECT EXAMINATION

BY MR. FROST:

Q: Doctor, are you still qualified to perform cranial operations?

A: Yes.

Q: Doctor, Miss Mouzayck gave you an example of being hit

* * *

self, the swelling doesn't appear instantaneously in every situation, does it?

A: I am afraid that we are not on the same wavelength. The swelling is brain swelling.

Q: Okay.

A: What you are—or at least what I understood your question is a lump that the skin has after an injury happens to the skin. It is not the same thing.

Q: Okay. Let's break them down. Could we first talk about the brain swelling. I thought we covered that already. It takes some period of time for the brain to get from a normal condition to a swollen condition where it would protrude through the skull as you have indicated on your diagram?

A: The time can take from a few minutes to several days.

Q: Several days?

A: From a few minutes to several days.

Q: So again, it would depend upon the type of trauma and the extent of the force of the trauma?

A: Correct.

Q: Now, let's go to the other situation of the lumps.

If I was to bump myself either on my head or my elbow or my leg, and since you are a neurosurgeon, let's at least use the head—if I was to bump myself, wouldn't it take some period of time before the swelling would build up?

* * *

CERTIFICATE OF SERVICE

I, BARBARA R. AXELROD hereby certify that on this 10th day of AUGUST 1989, a copy of the foregoing Petition of Appellee was served by United States first class mail, postage pre-paid, on the following party:

MARK B. FROST, Esquire
Pier Five at Penn's Landing
Philadelphia, PA 19106

_____

BARBARA R. AXELROD
Assistant City Solicitor

89-509

Supreme Court, U.S.
FILED
OCT 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1507

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

GERALDINE WALMSLEY, Administratrix of the Estate of THOMAS D. WALMSLEY, DECEASED, and on her own behalf,

Respondent

v.

THE CITY OF PHILADELPHIA and GREGORY SAMBOR and KEVIN TUCKER, Police Commissioners of the City of Philadelphia, and Police Officer John Doe and other unknown and unnamed officers and agents of the City of Philadelphia Police Department, individually and in their capacity as officers of the City of Philadelphia, Police Officer Ernest Colwell, Badge #7202, Police Officer Michael Valenti, Badge #2268, Police Lt. Augustine Carre, Badge #98,

Petitioners

v.

ROBERT WALMSLEY,

Respondent

Third-Party Defendant

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit, Civil Action No. 88-1507 reversing the order of the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 87-5812, granting Petitioners' motion for a directed verdict.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF POLICE OFFICER ERNEST COLWELL, BADGE #7202 AND POLICE OFFICER MICHAEL VALENTI, BADGE #2268

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether the Third Circuit Court of Appeals properly reversed the District Court's grant of a directed verdict on the plaintiff's claims that defendants Colwell and Valenti used excessive force when arresting Thomas Walmsley and were deliberately indifferent to his serious medical conditions in violation of his civil rights?

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COUNTER STATEMENT OF THE CASE

Plaintiff adopts and incorporates the Court of Appeals' recitation of the facts which are set forth in Petitioner's Petition on pages A-8 through A-14.

SUMMARY OF ARGUMENT

The Court of Appeals for the Third Circuit reversed the District Court's Directed Verdict in favor of Petitioner-Defendants because evidence presented by the Respondent-Plaintiff at trial made out claims against Petitioner-Defendants for excessive force and deliberate indifference to the serious medical condition of plaintiff's decedent. The instant Petition for Writ of Certiorari should be denied because this appeal involves only the issue of whether the plaintiff presented sufficient evidence from which a reasonable jury could infer that defendants Colwell and Valenti used excessive force in arresting the decedent. The only inquiry raised in this petition goes to the substantiality of the evidence and, accordingly, no issue of importance to the public or conflict of opinion among circuits exists.

ARGUMENT

In reviewing the District Court's directed verdict, the Third Circuit utilized the same standard applied by the lower court. When deciding a motion for a directed verdict, a court must consider the evidence in the light most favorable to the nonmoving party, and deny a defendant's motion "if there is evidence reasonably tending to support the recovery by plaintiff as to any of its theories of liability." *Flynn v. Bass Bros. Enters, Inc.*, 744 F. 2d 978, 983 (3d Cir. 1984) quoting *Dougherty v. Hooker Chemical Corp.*, 540 F. 2d 174, 178 (3d. Cir. 1976). However, a district court's grant of a directed verdict should be upheld if "without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict." *Id.* quoting *Brady v. Southern Ry.*, 320 U.S. 476, 479 (1943).

It is clear from the opinion of the Court of Appeals that sufficient evidence was presented by the plaintiff for the case to go to a jury on the issues of excessive force and deliberate indifference to a serious medical condition with respect to Officers Colwell and Valenti.

The instant Petition for Writ of Certiorari is merely a delaying tactic on the part of the Petitioners. Certiorari is granted only in cases involving principles the settlement of which is of importance to the public as distinguished from the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the court of appeals. *National Labor Relations Board v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951). The Third Circuit opinion in the instant action *Walmsley v. The City of Philadelphia*, 872 F.2d. 546 (3d Cir. 1989) (reh'g denied) clearly shows that the issue before this Court is strictly one of a factual nature involving only the individual parties. The question at hand and below was whether the facts presented by plaintiff, under the

applicable legal standards[1], present enough evidence to reach a jury. It is well settled that the Supreme Court will not grant a Writ of Certiorari merely to review the evidence or inferences drawn from it. *General Talking Pictures Corp. v. Western Electric Co.,* 304 U.S. 175 (1938).

Moreover, even if an important federal question was preserved and presented to the Court by Petitioner, this Court has refused to make an independent review of the review by the court of appeals with regard to the issue of substantiality of evidence supporting an order.

> The same considerations that should lead us to leave undisturbed, by denying certiorari, decisions of Courts of Appeals involving solely a fair assessment of a record on the issue of unsubstantility, ought to lead us to do no more than decide that there was such a fair assessment when the case is here, as this is, on other legal issues.
>
> *This is not the place to review a conflict to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony . . .*
>
> In such situations we should "adhere to the usual rule of noninterference where conclusions of Circuit Court of Appeals depend on appreciation of circumstances which admit in different interpretations." *Federal Trade Com. v. American Tobacco Co.,* 274 U.S. 543, 544, 71 L Ed. 1193, 1194, 47 S. Ct.

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1. Neither Petitioner or Respondent have challenged the legal standards applied to the facts. Only the substantiality of the evidence is in dispute here.

663. *National Labor Relations Board v. Pittsburgh S.S. Co., supra.*, 340 U.S. at 502-503. (Emphasis Added)

The factual issue presented by Petitioner is of little importance to the public and involves no conflict of opinion. Accordingly, Petitioner's Writ for Certiorari should be denied.

Conclusion

For the foregoing reasons, Respondent respectfully requests this Honorable Court deny the Petition for Writ of Certiorari in this matter.

Respectfully submitted,

FROST, DEMESQUITA & RUDOW

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